NO. 96-1400

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER, 1997

STATE OF CALIFORNIA, STATE LAND COMMISSION,
Petitioners,

v.

DEEP SEA RESEARCH, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF ATLANTIC MUTUAL INSURANCE COMPANY; SALVAGE ASSOCIATION; THE LONDON ASSURANCE; ALLIANCE ASSURANCE COMPANY, LTD; ROYAL EXCHANGE ASSURANCE; INDEMNITY MARINE ASSURANCE COMPANY, LTD; MARINE INSURANCE COMPANY, LTD; AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

The *Amici* will address the following questions:

1. Whether the test for abandonment under the Abandoned Shipwreck Act should be clarified to reflect the traditional principles of admiralty law which provide that abandonment can be inferred only when no one asserts a claim of ownership.

2. Whether a shipwreck should be treated as a unified *res* for purposes of the Abandoned Shipwreck Act.

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STATEMENT OF THE INTEREST OF THE *AMICI CURIAE*

Under the Abandoned Shipwreck Act of 1987 ("ASA"), 43 U.S.C. §§ 2101-2106 (1994), the States can acquire title to certain abandoned shipwrecks located on their submerged lands. The ASA, by its terms, applies only to "abandoned" shipwrecks, and the general principles of federal admiralty law apply to shipwrecks which are not found to be abandoned. Because the abandonment issue is a threshold question in determining jurisdiction, the test for abandonment under the ASA should be consistent with traditional admiralty principles under the law of salvage and the law of finds.

Atlantic Mutual Insurance Company, Salvage Association, London Assurance, Alliance Assurance Company, Ltd., Royal Exchange Assurance, Indemnity Marine Assurance Company, Ltd. and Marine Insurance Company, Ltd. (collectively referred to as the "Underwriters")[1] have an interest in this action as they (or their predecessors in interest) paid the claims on and thereby became entitled to exercise rights of ownership over a commercial shipment of gold cargo aboard the CENTRAL AMERICA, which sank off the coast of South Carolina in 1857. They asserted their entitlement to ownership of the gold cargo in an *in rem* proceeding filed by the salvor and prevailed in proving that they had not abandoned their

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[1] Pursuant to Sup. Ct. R. 37.3(a), the *Amici* have obtained the written consent to the filing of this brief from all parties. Pursuant to Sup. Ct. R. 37.6, counsel for the *Amici* certify that this brief was not authored in whole or in part by counsel for any party, and that no person or entity, other than the *Amici*, its members or its counsel, made a monetary contribution to the preparation or submission of the brief.

entitlement to exercise such rights under federal maritime law.[2] The Underwriters, therefore, are qualified to aid this Court in its analysis of the law of salvage and the law of finds.

STATEMENT OF THE CASE

In October 1993, Deep Sea Research, Inc. ("DSR"), a commercial salvor, discovered the *Brother Jonathan*, a sidewheel steamer which sank four miles off the coast of California in 1865. Pet. App. A21. In 1994, DRS filed an *in rem* action in the United States District Court for the Northern District of California seeking an award of title to, and salvage rights in, the vessel under the law of salvage and the law of finds.[3] Pet. App. A22. The State of California intervened and moved to dismiss the case on the grounds that it owned the shipwreck under the ASA and that the action was "against the State" and it was, therefore, barred by the Eleventh Amendment to the United States Constitution. Pet. App. A22-A24. The United States also intervened solely to refute a claim by DSR that the ASA was unconstitutional. Pet. App. A27.

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[2] *See Columbus-America Discovery Group, Inc. v. Atlantic Mutual Insurance Co.*, 974 F.2d 450 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993).

[3] Two insurance companies had paid the claims upon and became entitled to assert their rights as owners of the lion's share of the vessel and its cargo. The insurance companies assigned their interests in the wreck to DSR by a written contract, which represented that they had not abandoned their title to the shipwreck prior to assigning title. Pet. App. A31.

The district court ruled, *inter alia*, that the shipwreck was not abandoned and, accordingly, denied the State's motion to dismiss. Pet. App. A24. The court also issued an order appointing DSR the custodian and salvor of the wreck, but specifically declined to decide the issue of title to the wreck. Pet. App. A49-A51. On appeal, the Ninth Circuit adopted the following test for determining the issue: "a wreck is not abandoned unless either 1) title is affirmatively renounced or 2) abandonment can be inferred from the lapse of time or failure to pursue salvage efforts on the part of the owners." Pet. App. A15-A16. The court affirmed the district court's ruling that the *Brother Jonathan* was not "abandoned" for purposes of the ASA, finding that neither prong of the test had been met. Pet. App. A19. The Ninth Circuit also rejected the State's argument that the allegedly uninsured portions of the wreck should be deemed abandoned. Pet. App. A17-A18. After determining that the *Brother Jonathan* should be treated as a unified *res*, the court held that because the law is reluctant to find abandonment, and because a finding of partial abandonment would deprive those holding title to the unabandoned portion of the wreck access to the federal forum, the *Brother Jonathan* was not abandoned. Pet. App. A18-A19.

SUMMARY OF ARGUMENT

Because the issue of abandonment is a threshold question in determining jurisdiction, the test for abandonment under the ASA should be consistent with principles of admiralty law. Under the ancient law of salvage, the owner retains title to property lost at sea, unless there is an affirmative renunciation of title by the owner. Abandonment cannot be inferred, but must be proved by strong and convincing evidence. The law of finds is an exception to the

law of salvage and applies only when no owner appears to assert a claim in an *in rem* proceeding. Under these circumstances, abandonment can be inferred from the circumstances. The test for abandonment under the ASA developed by the Ninth Circuit in the opinion below combines the two standards, but fails to specify the circumstances under which abandonment can be inferred. This Court should affirm the opinion below, but clarify the standard to provide that abandonment can be inferred *only* when no one asserts a claim of ownership. Such a clarification will make the test for abandonment under the ASA consistent with general principles of admiralty law which have been applied uniformly by the circuit courts.

The Ninth Circuit's treatment of the *Brother Jonathan* as a unified *res* does not conflict with the Fourth Circuit's opinion in *Columbus-America Discovery Group, Inc. v. Atlantic Mutual Insurance Co.*, 974 F.2d 450 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993). Although the Fourth Circuit divided the *res* by awarding title to the insured commercial shipment of gold to the Underwriters and the remaining cargo and the wreck to the salvor, the federal admiralty court retained jurisdiction of the entire *res*. The Ninth Circuit, in the opinion below, addressed the issue of partial abandonment in the context of jurisdictional questions under the ASA. The court's treatment of the vessel and its cargo as a unified *res* avoided the confusion and inefficiency of having both federal and state courts adjudicate the issue. Because this decision recognizes the established presumption against abandonment under admiralty law, and advances Congressional intent, it should be upheld. This Court should reject the contention that if any portion of the *res* is abandoned, the entire *res* should be treated as abandoned for purposes of the ASA. Such a position is unsupported and

contrary to every tenet of admiralty law which has protected the rights of private property owners for centuries.

ARGUMENT

I. THE TEST FOR ABANDONMENT UNDER THE ASA SHOULD BE CONSISTENT WITH PRINCIPLES OF ADMIRALTY LAW.

Congress enacted the Abandoned Shipwreck Act of 1987 ("ASA"), 43 U.S.C. §§ 2101-2106, "to vest title to certain abandoned historic shipwrecks that are buried in State lands to the respective States and to clarify the management authority of the States for these abandoned historic shipwrecks." H. REP. NO. 100-514, 100th Cong. 2d Sess., Pt. 1, *reprinted in* 1988 U.S.C.C.A.N. 365.[4] Because the ASA does not define "abandonment," the Ninth Circuit, in the opinion below, developed a test for abandonment under the

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[4] Under the ASA, the United States asserts title to any abandoned shipwreck that is--

> (1) embedded in the submerged lands of a State;
> (2) embedded in coralline formations protected by a State on its submerged lands; or
> (3) on submerged lands of a State and included, in, or determined eligible for inclusion in, the National Register of Historic Places.

43 U.S.C. § 2105(a). Title to such abandoned shipwrecks is transferred to the States "in or on whose submerged lands the shipwreck is located." 43 U.S.C. § 2105(c).

statute which purportedly followed principles of admiralty law.[5]

Abandonment is a threshold question in determining whether the ASA applies or whether federal admiralty courts have jurisdiction over the shipwrecks. The ASA provides that "[t]he law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 2105 of this title applies." 43 U.S.C. § 2106(a). The statute also provides that it "shall not change the laws of the United States relating to shipwrecks, other than those to which this chapter applies." 43 U.S.C. § 2106(b). Thus, the question of abandonment must be resolved to determine whether title passes to the State under the ASA or whether the federal admiralty courts retain jurisdiction over the shipwrecks. The test for abandonment under the ASA must, therefore, reflect the principles of admiralty law.

As the Petitioners point out, "Congress clearly intended that the definition of 'abandoned' developed in general maritime law should be applied to determine whether a vessel meets the criteria of section 2105(a) of the ASA." Petitioners' Brief at 32 (citing H.R. REP. NO. 100-514, 100th Cong. 2d. Sess., Pt. II (1988), *reprinted in* 1988 U.S.C.C.A.N. 370, 374). The United States also correctly asserts that "if Congress adopts a term that has a certain meaning in admiralty law and does not define it differently in the words of the statute, the term should be given its admiralty law meaning." Brief of United States at 39 (citing

[5] The test established in the opinion below was subsequently followed by the Sixth Circuit in *Fairport International Exploration, Inc. v. Shipwrecked Vessel*, 105 F.3d 1078 (6th Cir. 1997).

Moskal v. United States, 498 U.S. 103, 114 (1990)). Furthermore, the courts which have considered the issue of abandonment under the ASA, including the court below, have looked to the definition under the principles of federal admiralty law. *See, eg., Fairport International Exploration, Inc. v. Shipwrecked Vessel*, 105 F.3d 1078 (6th Cir. 1997); *Sunken Treasure, Inc. v. Unidentified, Wrecked and Abandoned Vessel*, 857 F. Supp. 1129 (D. St. Croix 1994); *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the SB "Lady Elgin"*, 755 F. Supp. 213 (N.D. Ill. 1990), *amended* 1991 WL 2536 (1991)). There is no question that the definition of abandonment under the ASA should adhere to the principles of federal admiralty law, which were developed over several centuries and have been applied uniformly by the circuit courts.

A. The Test for Abandonment Under the ASA Should Reflect Principles of Admiralty Law Which Provide that Abandonment Can Be Inferred Only When No One Asserts a Claim of Ownership.

Under admiralty law, if property has not been abandoned, title remains in the owner and the salvor receives a salvage award under the law of salvage; if property has been abandoned, the law of finds applies and title passes to the salvor. In admiralty, different standards for determining abandonment are imposed respectively under the law of salvage and the law of finds. *See Fairport*, 105 F.3d at 1084; *Columbus-America Discovery Group, Inc. v. Atlantic Mutual Insurance Co.*, 974 F.2d 450, 464-65 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993). The determination as to which principle of maritime law applies is dependent on one factor -- whether or not the owner appears and asserts a claim of ownership in the *in rem* proceeding.

Admiralty favors the ancient law of salvage, in which the owner retains title to property lost at sea.[6] *Columbus-America*, 974 F.2d at 460; *Hener v. United States*, 525 F. Supp. 350, 356 (S.D. N.Y. 1981). "Admiralty courts have adhered to the traditional and realistic premise that property previously owned but lost at sea has been taken involuntarily out of the owner's possession and control by the forces of nature at work in oceans and waterways." *Hener*, 525 F. Supp. at 356-57. When a previous owner claims long-lost property that was involuntarily taken from his control, the law is hesitant to find an abandonment and such must be proved by strong and convincing evidence. *Columbus-America*, 974 F.2d at 461; *see also Hener*, 525 F. Supp. at 357; *Marex v. Unidentified, Wrecked & Abandoned Vessel*, 952 F. Supp. 825, 828 (E.D. Ga. 1997).[7] "Abandonment is said to be a voluntary act which must be proved by a clear and unmistakable affirmative act to indicate a purpose to repudiate

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[6] The law of salvage was first formalized in the Rhodian Maritime Code which dates back to the 9th Century B.C. M. NORRIS, THE LAW OF SALVAGE § 5 (1958). Rules pertaining to salvage were later set out in the Marine Ordinances of Trani, Italy and the Rules of Oleron during the Middle Ages. *Id.* at §§ 7, 8. The Rules of Oleron are reprinted in 30 F. Cas. 1171 (1897).

[7] Although in *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the SB "Lady Elgin"*, 755 F. Supp. 213, 214 (N.D. Ill. 1991), *vacated and remanded on other grounds*, 960 F.2d 665 (7th Cir. 1992), *cert. denied*, 506 U.S. 985 (1992) and *Sunken Treasure, Inc. v. Unidentified, Wrecked and Abandoned Vessel*, 857 F. Supp. 1129, 1133-34 (D. St. Croix 1994), the courts did not adopt a test for abandonment under the ASA, they quote the analysis of the law of salvage and the law of finds in *Columbus-America* with approval.

ownership." *THE PORT HUNTER*, 6 F. Supp. 1009, 1011 (D.Mass. 1934); *see also* T. SCHOENBAUM, ADMIRALTY and MARITIME LAW § 15-7, 5-12 (2d ed. 1994); 3A M. NORRIS, BENEDICT ON ADMIRALTY: *The Law of Salvage* § 158, at 11-16 (7th ed. rev. 1997). Under the law of salvage, the salvor does not gain title to the property, but receives a salvage award in the form of a lien against the salved property. *See The Sabine*, 101 U.S. 384 (1879); *see also* GILMORE & BLACK, THE LAW OF ADMIRALTY, 628 (2d ed. 1975).[8]

The law of finds, under which a salvor may gain title, is an exception to the traditional application of the law of salvage, and has been applied where no owner has come forward to assert a claim and is not likely to do so.[9] *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987); *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978); *Commonwealth v. Maritime Underwater*

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[8] An award for salvage "generally far exceeds a mere remuneration *pro opere et labore* - the excess being intended, upon principles of sound public policy, not only as a reward to the particular salvor, but, also, as an inducement to others to render like services." W. MARVIN, A TREATISE ON THE LAW of WRECK AND SALVAGE § 97, at 105 (1858); *see also Mason v. THE BLAIREAU*, 6 U.S. (2 Cranch) 240, 266, 2 L.Ed. 266 (1804).

[9] Traditionally, the law of finds was applied only to maritime property which had never been owned by anybody, such as ambergris, whales, and fish. 3A BENEDICT ON ADMIRALTY § 158 at 11-15. A relatively recent trend in the law, has seen the law of finds applied to long lost and abandoned shipwrecks. *Id.* § at 11-16 to 11-18.

Surveys, Inc., 403 Mass. 501, 1989 A.M.C. 425, 429 (1988). Only under these circumstances can abandonment be inferred from the circumstances, including the passage of time. "The law of finds, in simple terms, is the old rule of finders-keepers." *Zych v. Unidentified Wrecked and Abandoned Vessel, Believed to be the "SEABIRD"*, 941 F.2d 525, 532, n.10 (7th Cir. 1991), *cert. denied*, __ U.S. __, 130 L. Ed. 2d 345, 115 S. Ct. 420 (1992)(citations omitted). The law of finds also contains an exception to this general rule. When the abandoned property is embedded in the land, title is awarded to the owner of the land. *Id.*; *see also Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985)(applying the exception to the law of finds).[10]

In the opinion below, the Ninth Circuit developed a test for abandonment under the ASA which combines the two standards: "a wreck is not abandoned unless either 1) title is affirmatively renounced or 2) abandonment can be inferred from the lapse of time or failure to pursue salvage efforts on the part of the owners." Pet. App. A15-A16. This two-pronged test, however, fails to explain the circumstances under which each prong should be applied.

[10] The House Report commented that the ASA was "consistent with the recognized exception from the law of finds for shipwrecks embedded in submerged lands of a state." H.R. REP. NO. 100-514, 100th Cong., 2d Sess., Pt. 2, *reprinted in* 1988 U.S.C.C.A.N. 370, 376 (citing *Chance v. Certain Artifacts Found and Salvaged from the NASHVILLE a/k/a The Rattlesnake*, 606 F. Supp. 801 (S.D. Ga. 1984), *aff'd*, 775 F.2d 1511 (11th Cir. 1985)).

This Court should clarify the test for abandonment under the ASA to provide that abandonment can be inferred *only* when no one comes forward to assert a claim of ownership as follows: "a wreck is not abandoned unless either 1) title is affirmatively renounced or 2) *where no one asserts a claim of ownership*, abandonment can be inferred from the lapse of time or failure to pursue salvage efforts on the part of the owners." This definition is consistent with general principles of admiralty law under the law of salvage and the law of finds. The definition also adheres to principles of property law by preserving the rights of private property owners while satisfying Congressional intent in promoting preservation of abandoned historic shipwrecks.

The district court in the case below recognized the principles of admiralty law in explaining the test for abandonment under the law of salvage. *See* Pet. App. A30-A31. The Ninth Circuit, in affirming the district court, however, acknowledged that under certain circumstances, abandonment can be inferred, stating that:

> [t]raditionally, maritime law has found abandonment when title to a vessel has been affirmatively renounced, or when circumstances give rise to an inference that the vessel has been abandoned; courts have found abandonment, for instance, when a vessel is "so long lost that time can be presumed to have eroded any realistic claim of original title." *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987).

Pet. App. A15. In adopting the second prong of the test in which abandonment can be inferred, the court failed to specify that abandonment can be inferred *only* when the owner or underwriter entitled to assert a claim of ownership does not appear and claim ownership.

In *Columbus-America*, 974 F.2d 450, the Fourth Circuit explained that in *Martha's Vineyard*, "the First Circuit made it a point to state that, '[a]fter petitioner brought its action *in rem* in the district court, *no person or firm appeared to assert any overall claim of ownership*.'" 974 F.2d at 462 (quoting 833 F.2d at 1065)(emphasis added). When the owner comes forward and makes an appearance, the courts have uniformly applied the law of salvage. *Hener*, 525 F. Supp. at 357. In *Columbus-America*, the Fourth Circuit explained that there is no inference or presumption of abandonment when an owner asserts a claim, stating:

> when sunken ships or their cargo are rescued from the bottom of the ocean by those other than the owners, courts favor applying the law of salvage over the law of finds. Finds law should be applied, however, in situations where the previous owners are found to have abandoned their property. Such abandonment must be proved by clear and convincing evidence, though, such as an owner's express declaration abandoning title. Should the property encompass an ancient and long lost shipwreck, a court may infer an abandonment. *Such an inference would be improper, though, should a previous owner appear and assert his ownership interest; in such a case the normal presumptions would apply and an abandonment would have to be proved by strong and convincing evidence.*

Id. at 464-65. (emphasis added). In reversing the lower court's ruling, the Fourth Circuit, noted that: "[t]he case below appears to be the only reported decision involving salvaged treasure from ancient shipwrecks wherein a court has applied the law of finds despite the fact that the previous owner appeared in court. In all other finds law cases, no prior owner has appeared." *Id.* at 461.

The Petitioners, the various preservation and archeological societies[11] ("the Societies") and the States[12] are incorrect in contending that under maritime law, abandonment can be presumed based simply on the passage of time. Petitioners' Brief at 31; Societies' Brief at 19-20; States' Brief at 16-17. This contention reflects a misunderstanding of the distinction between the two standards

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[11] National Trust for Historic Preservation, Advisory Council on Underwater Archaeology, Council of American Maritime Museums, Institute of Nautical Archaeology, National Conference of State Historic Preservation Officers, North American Society for Oceanic History, Society for American Archaeology, Society for California Archaeology, Society for Historical Archaeology, and Society of Professional Archaeologists filed an *amici curiae* brief in support of Petitioners.

[12] The States of Florida, Alabama, Alaska, Georgia, Idaho, Illinois, Louisiana, Maryland, Michigan, Mississippi, New York, North Carolina, South Carolina, The Commonwealths of Massachusetts and Virginia, and the Territories of Guam and the Virgin Islands filed an *amici curiae* brief in support of Petitioners.

under the law of salvage and the law of finds, and is antithetical to property law and the basic tenets of the law of salvage. There is no statute of limitations on property ownership. "Lapse of time and nonuser are not sufficient, in and of themselves, to constitute an abandonment." *Columbus-America*, 974 F.2d at 461 (quoting *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452, 456 (E.D. Va. 1960)); *see also Hatteras, Inc. v. THE U.S.S. HATTERAS*, 1984 A.M.C. 1094, 1097 n. 5 (S.D. Tex. 1981)("While mere nonuse of property and lapse of time without more do not establish abandonment, they may, under circumstances where the owner has otherwise failed to act or assert any claim to property, support an inference of intent to abandon."); *Wilkie v. Two Hundred and Five Boxes of Sugar*, 29 F.Cas. 1247 (D.S.C. 1796)(length of time does not divest an original owner of his derelict property lost at sea).[13]

In support of their position that the passage of time in and of itself is sufficient to infer abandonment, the Societies and the States rely on the statement of the Fifth Circuit in *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978)

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[13] Although the States contend that "[t]he 128 year time period alone should have meant that the *Brother Jonathan* was abandoned" (States' Brief at 17), they fail to cite a single authority for such a proposition. This position is contrary to the rulings in *The Lady Elgin*, 755 F. Supp. at 216 (finding that the insurance company which paid the claims on the vessel and cargo did not abandon the shipwreck which sank in 1860) and *Columbus-America*, 974 F.2d at 464-65 (finding no abandonment where insurance companies which paid claims on a commercial shipment of gold had initiated salvage efforts shortly after the vessel sank in 1857 and continued to negotiate with salvors during the intervening 130 years.).

that: "[d]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths." Societies' Brief at 20; States' Brief at 17. This statement is the rationale for applying the law of finds when no owner asserts a claim. In placing this widely quoted passage in context, the Fourth Circuit in *Columbus-America* explained:

> [y]et the Court there also took the trouble to note that it had been stipulated by all parties involved that the original owners had abandoned the wrecks, and the district court also made mention of the fact that, "The modern day government of Spain has expressed no interest in filing a claim in this litigation as a successor-owner." *Id.* at 336 n. 9; *Treasure Salvors, Inc., v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 556 F. Supp. 1319, 1334 n. 2 (S.D. Fla. 1983). Another Spanish wreck, this time from the 1715 Plate Fleet, was involved in *Cobb Coin Co., Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186 (S.D. Fla. 1981), and there the Spanish government again made no claim of ownership.

Id. at 462. Although the Petitioners, the Societies and the States misstate the law by contending that passage of time is sufficient to infer abandonment, the United States properly

explains that abandonment can be inferred only when no owner asserts a claim.[14]

The States also contend that the test for abandonment adopted by the Ninth Circuit will be nearly impossible to meet because it is like proving a *non sequitur*. *See* States' Brief at 16. The States contend that for vessels lost over 100 years, evidence of an express abandonment would most likely be lost. They further argue that States do not have access to whom the past owners were or to records to determine if the vessels were insured. This argument highlights the need to clarify the Ninth Circuit's test for abandonment to reflect principles of admiralty law. Under the law of salvage, the person or firm asserting a claim of ownership must appear in an *in rem* proceeding and establish a *prima facie* showing of ownership before the issue of proving an express abandonment will be reached. *Columbus-America*, 974 F.2d at 465. The States will not be required to locate owners or their successors or determine whether vessels or their cargo were insured. Under the test for abandonment, as clarified to

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[14] The United States asserts that:

> [a]though "abandoned" is not defined in the ASA, the other statutory terms in the Act, the legislative history, and the background of admiralty law support the conclusion that abandonment may be inferred *when the owner of the vessel does not come forward to establish a claim* when the shipwreck is discovered and a long period of time has elapsed since the ship sank.

Brief of United States at 17; *see also id.* at 36 and 42.

reflect principles of admiralty law, abandonment can be inferred from the circumstances when no owner comes forward to assert a claim.[15] Thus, the States' concern about the burden of establishing abandonment is unfounded.

In admiralty, when an owner appears and asserts a claim, abandonment cannot be inferred, but must be proved by strong and convincing evidence. Only in those instances where no owner asserts a claim can abandonment be inferred from the circumstances, including lapse of time. The test for abandonment under the ASA developed by the Ninth Circuit should be clarified to reflect these principles. Such a clarification is necessary to end the confusion as to the application of the different standards for abandonment under the law of salvage and the law of finds.

B. Failure of an Owner to Attempt Salvage Efforts Does Not Give Rise to an Inference of Abandonment.

The Ninth Circuit was correct in ruling that "[w]hen the technology to conduct salvage operations has been developed recently, failure on the part of an owner to attempt to salvage the wreck does not give rise to an inference that the owner has abandoned title to the vessel." Pet. App. A17. (citing *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the SB "Lady Elgin"*, 755 F. Supp. 213, 216 (N.D. Ill. 1990), *amended* 1991 WL 2536 (1991)). This

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[15] Under the test established by the Ninth Circuit, it is unclear the circumstances under which the States would be required to prove affirmative renunciation of title or when abandonment can be inferred.

finding correctly applies the established principle that "[a]bandonment is the voluntary relinquishment of one's rights in a property." *The Lady Elgin*, 755 F. Supp. at 214 (citing *Mucha v. King*, 792 F.2d 602, 610 (7th Cir. 1986)). "It must be voluntary, with a positive intent to part with ownership, and without coercion or pressure." *Id.* (quoting *Katsaris v. United States*, 684 F.2d 758, 762 (11th Cir. 1982)).

Property owners are not required to take action in order to retain title to property lost at sea. When an owner asserts a claim, there is a presumption that there was no abandonment under the law of salvage, and it must be proved by strong and convincing evidence. *Columbus-America*, 974 F.2d at 461; *see also Hener*; *Marex v. Unidentified, Wrecked & Abandoned Vessel*, 952 F. Supp. 825 (E.D. Ga. 1997). Even when it is a simple matter to recover property, an owner's failure to do so does not result in a presumption that the owner voluntarily relinquished title. "When articles are lost at sea the title of the owner in them remains, even if they are found floating on the surface or after being cast upon the shore." *Hener*, 525 F. Supp. at 357 (quoting 3A M. NORRIS, BENEDICT ON ADMIRALTY: *The Law of Salvage* 11-14, 11-1 (7th ed. rev. 1980)).

Both the United States and the Societies contend that the absence of any feasible means to recover a sunken vessel would support an inference that the owner had given up any prospect of doing so. Brief of the United States at 44; Societies' Brief at 21. They fail to recognize that abandonment must be voluntary. The fact that the owner has little or no hope of recovering the property does not support a finding that the owner voluntarily relinquished title with no intention of reclaiming it. The Ninth Circuit followed

established precedent in ruling that when technology to conduct salvage operations has been recently developed, an owner's failure to attempt to salvage a wreck does not give rise to an inference of abandonment.

C. The Test for Abandonment That Reflects Traditional Principles of Admiralty Law is Consistent with Congressional Intent and the Regulations Promulgated Under the ASA.

The test for abandonment that requires an affirmative renunciation of title and provides that abandonment can be inferred *only* when the owner fails to assert a claim is consistent with Congressional intent. As the House Report explains:

> [t]he Committee notes that the term "abandoned" does not require the original owner to actively disclaim title or ownership. The abandonment or relinquishment of ownership rights may be implied or otherwise inferred, *as by an owner never asserting any control over or otherwise indicating his claim of possession of the shipwreck.*

H.R. REP. NO. 100-514, 100th Cong., 2d Sess., Pt. 1, *reprinted in* 1988 U.S.C.C.A.N. 365, 366 (emphasis added). The only example mentioned in the House Report of when abandonment can be inferred is the situation in which the owner never asserts control or makes a claim.

The regulations promulgated under the ASA also recognize the rights of private property owners in providing that: "[w]hen the owner of a sunken vessel is paid the full

value of the vessel (such as receiving payment from an insurance underwriter) the shipwreck is not considered to be abandoned. In such cases, title to the wrecked vessel is passed to the party who paid the owner." 55 Fed. Reg. 50116, 51020-51021 (December 4, 1990). The regulations, thus, embrace the principle that the ASA does not apply to property in which an underwriter has paid for its loss and has entitlement to take over its ownership.[16]

Furthermore, the definition of "abandoned shipwreck" set forth in the regulations reflects the principle that abandonment must be voluntary. It is defined as "any shipwreck to which title voluntarily has been given up by the owner with the intent of never claiming a right or interest in the future and without vesting ownership in any other person." *Id.* at 50120. These regulations incorporate the generally established principles of property law that an owner retains title to property unless he voluntarily relinquishes title with the intent of never reclaiming it. One man's property may not be taken for the benefit of others. *Kelleher v. French*, 22 F.2d 341, 343 (W.D. Va. 1927), *aff'd*, 278 U.S. 563 (1928). A fundamental maxim of a free government is that the right of private property remain sacred. *Stanley v. Colt*, 72 U.S. (5 Wall.) 119 (1866). This fundamental maxim is incorporated in the basic legal principle of admiralty law

[16] While the regulations recognize the rights of underwriters, it should be noted that they do not accurately state the law of subrogation. When an underwriter pays a claim for a total loss, it has a right to exercise ownership of the subject matter insured. A.L. PARKS, MARINE INSURANCE AND AVERAGE, Vol. II, 1085 (1st ed. 1987). *Id.* The underwriter may or may not choose to exercise its right.

that ownership in property continues absent an affirmative act of abandonment and that the passage of time alone cannot divest ownership. *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452, 456 (E.D. Va. 1960). This universal principle which has been the cornerstone of property rights under admiralty law for many centuries, is consistent with Congressional intent in enacting the ASA and reflected in the regulations promulgated thereunder.[17]

II. THERE IS NO SPLIT AMONG THE CIRCUITS RELATING TO THE RULING THAT THE *BROTHER JONATHAN* SHOULD BE TREATED AS A UNIFIED *RES* UNDER THE ASA.

The Petitioners attempt to create a split among the circuits where none exists. The contention that the Ninth Circuit's ruling which treats the *Brother Jonathan* as a unified *res* is contrary to the Fourth Circuit's opinion in *Columbus-America*, is misleading. In making this argument, Petitioners overlook one crucial distinction between the cases. *Columbus-America* was not decided under the ASA and, therefore, no jurisdictional questions were at issue. The Fourth Circuit found that the Underwriters had paid claims upon and became the owners of a commercial shipment of gold cargo aboard the CENTRAL AMERICA in the amount of $1,219,189 (1857 valuation). 974 F.2d at 465. The court

[17] Even if Congress intended to adopt a definition of abandonment which deprives owners of their rights to property lost at sea, it does not have the power to so as such a result constitutes deprivation of the right to property without due process of law, in violation of the Fifth Amendment to the United States Constitution.

found that the Underwriters had not abandoned their interests and thus retained title to the gold cargo under the law of salvage. The court ruled that should more gold be rescued, the salvor acquired title to such excess under the law of finds. *See id.* at 465 n. 6. The Fourth Circuit properly applied principles of the law of salvage and the law of finds by ruling that the owners of property which was not abandoned retained title to it and awarding title to abandoned property to the finder. Although the title to the *res* was divided between the salvor and the owners, the federal admiralty court retained jurisdiction over the entire *res*.

The Ninth Circuit, in the opinion below, addressed the issue of partial abandonment in the context of jurisdictional questions under the ASA. The Court opined that if the vessel (and its cargo) were found to be only partially abandoned, both federal and state courts would adjudicate the issue, and noted that it was unlikely that Congress intended such a confusing and inefficient approach. Pet. App. A18. The Court concluded that because the law is reluctant to find abandonment, the unified *res* of the *Brother Jonathan* was not abandoned. Pet. App. A18-A19. Because this ruling incorporates the strong presumption against abandonment under admiralty law and advances Congressional intent, it should be upheld.

This Court should reject the Societies' contention that the unified *res* principle should operate in the other direction, *i.e.*, that a partially abandoned shipwreck should be treated as completely abandoned for purposes of the ASA. *See* Societies' Brief at 24 n. 29. Such a position is contrary to every tenet of admiralty law, including the law of finds. The Societies cite no authority for such a proposition, but advance this argument solely on policy grounds, contending that it

would further the purposes of the ASA. The position of the Societies, however, is contrary to the purpose of the ASA, which allows the States to acquire title only to "abandoned shipwrecks." It is also contrary to the regulations promulgated thereunder, which protect the rights of private property owners. *See* Discussion at Section I.C., *supra*. This Court should not be persuaded by such an insupportable attempt to vitiate established principles of law which have survived for many centuries.

CONCLUSION

This Court should affirm the ruling of the Ninth Circuit in the opinion below and clarify the test for abandonment under the ASA to provide that "a wreck is not abandoned unless either 1) title is affirmatively renounced or 2) *where no one asserts a claim of ownership*, abandonment can be inferred from the lapse of time or failure to pursue salvage efforts on the part of the owners." This definition is consistent with traditional principles of admiralty law which have been applied uniformly by the circuit courts. The definition also promotes the principles of property law by preserving rights of private property owners while satisfying Congressional intent in promoting preservation of abandoned historic shipwrecks.

The Court should uphold the Ninth Circuit's treatment of the *Brother Jonathan* as a unified *res* as it recognizes the strong presumption against abandonment and Congressional intent to avoid confusion and inefficiency in having the federal and state courts adjudicate the issue. This Court, should flatly reject the suggestion that partially abandoned property should be treated as completely abandoned under the ASA. That suggestion is contrary to centuries old principles

of admiralty law as well as the ASA, its legislative history and the regulations promulgated under the statute which protect the rights of private property owners.

Respectfully submitted,

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